SUPREME COURT, U. S.

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1970

No. 1059

United Mine Workers of America,
Petitioner,

v.

Chester Railing and Paul Railing,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITIONER'S REPLY TO RESPONDENTS' OBJECTION TO THE PETITION FOR WRIT OF CERTIORARI

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PETITIONER'S REPLY TO RESPONDENTS' OBJECTION TO THE PETITION FOR WRIT OF CERTIORARI

Railing's[1] objections to the Writ sought by UMW in the instant case are (a) the instant case must be remanded and that, on remand, Railing's motion to amend to assert an antitrust claim should be allowed, thereby making the statute of limitations question unimportant, and (b) the Fourth Circuit's ruling was sound and does not conflict with any prior decision. UMW responds thereto *seriatim:*

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[1]The same abbreviations are employed herein as were used in footnotes 1 and 2 of the instant Petition for Writ of Certiorari. In addition, the abbreviation "Op. Br. ....." refers to Railing's Objection to the Petition for Writ of Certiorari.

A. RAILING'S OBJECTION TO THE INSTANT WRIT OF CERTIORARI BASED UPON THEIR DESIRE TO AMEND THE COMPLAINT HEREIN MUST BE REJECTED BY THIS COURT.

1. Railing Would Deprive UMW of the Right of Review to Test the Validity of the Fourth Circuit's Judgment.

Both the district court and the Fourth Circuit regarded the judgment under review as a "final judgment".[2] Railing ignores this fact in their statement (Op. Br. 10) that "This Appeal Covers Only a Part of the Case". Moreover, the Fourth Circuit's remand was "for further proceedings not inconsistent with this opinion",[3] which dealt *exclusively* with the statute of limitations issue under Section 303, Labor Management Relations Act of 1947.

2. Railing Erroneously Claims Their Antitrust Amendment Would Make the Limitations Question Unimportant.

Railing erroneously argues that "on the Remand the Motion to Amend To Assert an Antitrust Claim Should Be Allowed and This Would Make the Statute of Limitations Question Unimportant" (Op. Br. 10).

In the instant certiorari petition (pp. 21-22), UMW assigns as one reason for this Court's granting the Writ that the Fourth Circuit's result requires the district court upon remand to apply two different interpretations of the same limitation statute. Railing ignores that in their application to the Fourth Circuit for permission to amend the complaint, they admitted this "would possibly raise a plethora of statute of limitations problems at the trial" and could conceivably wipe out much of the benefit Railing "might have from the common law conspiracy claim under the principle of pendent juris-

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[2]See Petition, Appendix A, p. 26a; Appendix B, p. 34a.

[3]See Petition, Appendix B, p. 40a.

diction".[4] Railing ignores, too, that their Fourth Circuit application expressly asserted that the proposed amendment sought by them *"would replace the common law conspiracy claim in the complaint with a Sherman Act conspiracy claim"*. Railing did not suggest the proposed amendment would supplant the complaint's alleged secondary activity.

Thus, it is evident that the Fourth Circuit's ruling concerning the appropriate limitations rule involved in a Section 303 action remains an important one for review by this Court. It is equally manifest that Railing's contention that the proposed amendment would render unimportant the limitations issue is totally erroneous.

3. Under Applicable Law, the Proposed Amendment is Improper.

Railing sought permission to amend the instant complaint for the first time in the Fourth Circuit after Railing had perfected and pursued their appeal from the district court's judgment, the Fourth Circuit had rendered its opinion and judgment adverse to UMW, and UMW had filed its petition for rehearing *en banc*. The Fourth Circuit properly rejected Railing's attempt to amend, consistent with its holding in *Tahir Erk* v. *Glen L. Martin Co.*, 116 F.2d 865, 871, that ". . . we think it better practice to permit it to be made before the District Court in connection with further proceedings to be had upon the remand."

Railing's application was not filed until August, 1970. By July 14, 1959, all strike activity had ceased. Thus, even assuming the validity of the Fourth Circuit's ruling on the limitations issue (which UMW denies), more than

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[4] See Railing's Objection to the Petition for Certiorari, Appendix A, p. 2a.

11 years had elapsed between the cessation and service of the proposed amendment, more than 9 years since the 2-year limitation expired, and more than 7 years since the 4-year period under the federal antitrust limitations period.

Moreover, contrary to Railing's assertion that there is no sound reason for the district court to disallow the amendment, Rule 15(c), Federal Rules of Civil Procedure restricts the application of the doctrine of relating back to the date of the original pleading to situations where "the claim or defense asserted in the amended pleading *arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading*". Moore's Federal Practice, Second Edition, Volume 3, p. 1026, recognizes "it is still the rule that an amendment which states an entirely new claim for relief *based on different facts will not relate back*". Similarly, Barron & Holtzoff (Wright Ed.), Federal Practice and Procedure, Volume 1A, section 448 recites:

> "If the evidence tending to support the facts alleged in the amended complaint could have been introduced under the former pleading, the amendment is not objectionable"

and

> "The fundamental question is whether the defendant has been put on notice with regard to the claim against him raised by the amended pleading."

Notably, Railing conceded (Op. Br., Appendix A, p. 2a) that the claim for alleged conspiratorial and coercive activities of UMW related to the *"state created claim"*. Both the district court and the *dissenting opinion* took note that the "non-peaceful, violent, coercive, and con-

spiratorial activities" arose from a "common-law tort".[5] Clearly, nothing in the complaint's allegations related to any alleged federal antitrust violation and hence Railing could not claim that UMW had been put on notice with regard to the antitrust claim now posed by the proposed amended pleading, as the rule expressed above from Barron & Holtzoff's text requires. Again, the rule expressed by Moore's Federal Practice, Volume 3, p. 1026 that "it is still the rule that an amendment which states an entirely new claim for relief *based on different facts will not relate back*" would not warrant the admission of facts pertaining to the federal antitrust claim.

Moreover, Railing's suggested evidence as support for the attempted amendment (Op. Br. 4-9) not only discloses nothing of a conspiratorial nature but Railing's characterization thereof as "new facts" is grossly erroneous since they were available at all times since 1958 as to the Protective Wage Clause (PWC) of the National Agreement of 1958 and since 1964 with reference to the 80-cent clause—long prior to the district court's 1967 ruling (Pet. App. A, p.1a).

UMW has herein demonstrated (*ante*, pp. 2-3) that the Fourth Circuit's judgment on the limitations issue under the Act's Section 303 remains of vital concern to UMW; and since Railing admits their intention is "*to make this motion in the District Court when the case is remanded*" (Op. Br. 10), UMW deems discussion of cases cited by Railing (Op. Br. 5-9, 11) and UMW's challenge of Railing's erroneous description of the evidence would appear immaterial, irrelevant and burdensome to this Court, when the crucial question for review is the Fourth Circuit's holding on the issue of the statute

[5]Petition for Certiorari, Appendix B, p. 41a.

of limitations as presented in the instant certiorari petition.

B. RAILING'S OBJECTIONS TO THE ISSUANCE OF THE WRIT HEREIN TOTALLY IGNORE UMW'S REASONS FOR THE WRIT'S ISSUANCE.

*Railing's claim (Op. Br. 11-13) that the Fourth Circ*uit's ruling was sound on the limitations issue and not in conflict with any prior decision is no more than an assertion of counsel, since Railing failed to respond to UMW's assigned reasons for granting the Writ herein (Pet. 14-23), which abundantly demonstrates the need for the Writ's award.

In addition, Railing admits [R. 19(73)] that employees wanted him to sign a standard UMW contract. Thus, primary picketing was implicit in the case. As recognized in *Teamsters, Local 20* v. *Morton*, 377 U.S. 252, 261-62, lawful primary activities could not serve as a predicate for damages; and since there is an admitted admixture of both *lawful primary activity* and alleged barred secondary activity under the Act's Section 303, such fact invites affirmance of the district court's rule and view that accrual of a cause of action for the violation of a Section 303 action occurs *when the damage occurs*, in conformity with West Virginia's rule[6] and consonant with *Int. Union, UAW v. Hoosier Cardinal Corp.*, 383 U.S. 696,[7]

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[6] See Petition for Certiorari, pp. 11, 15-16.

[7] See Petition for Certiorari, pp. 14, 16, 19.

CONCLUSION

For the reasons assigned in its Petition for Certiorari and herein, UMW prays that the Writ be granted and issued to review the judgment, order and opinions of the Fourth Circuit entered in Case No. 12,723. Petitioner intends to urge each of the points and questions presented, though not argued herein.

Respectfully submitted,

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January, 1971

APPENDIX

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Rule 15, Federal Rules of Civil Procedure

". . . (c) Relation Back of Amendments. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. . . ."